

**CHARLTON WALKER**  
Claimant

**SYSTEMS MATERIAL HANDLING CO., INC.**  
Respondent

**LIBERTY MUTUAL INSURANCE COMPANY**  
Insurance Carrier

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

**ISSUES**

- (1) Both claimant and respondent requested Appeals Board review of the nature and extent of claimant's disability.
- (2) Claimant asked the Appeals Board to review whether the Administrative Law Judge erred in calculating the Award based only on the average weekly wage of the claimant not including fringe benefit costs.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Administrative Law Judge found claimant was entitled to permanent partial general disability benefits of 50 percent based on work disability. The parties stipulated claimant met with personal injury by accident that arose out of and in the course of his employment with the respondent on December 15, 1993. Therefore, claimant's eligibility for a work disability award is determined by the "new act" provisions of K.S.A. 44-510e. An employee is eligible for work disability if the employee is not earning wages equal to 90% or more of the average gross weekly wage the employee was earning at the time of the injury. The "new act" work disability test contains two components. The first is the loss of a worker's ability to perform work tasks the worker performed in employment in the 15 year period next preceding the accident. The second component of the work disability test is the difference between the wage the worker was earning at the time of injury and the wage the worker is earning post injury. Both of those components are then required to be averaged together to arrive at a work disability. See K.S.A. 44-510e(a).

In the instant case, the Administrative Law Judge found claimant failed to prove he suffered a work tasks loss as a result of his work-related injury. However, as claimant was not working at the time of the regular hearing, the Administrative Law Judge found claimant had a 100 percent wage loss. Thus, the Administrative Law Judge found claimant was entitled to a work disability in the amount of 50 percent by averaging the 0 percent work tasks loss with the 100 percent wage loss as required by statute.

The claimant presented the testimony of Dr. P. Brent Koprivica, who examined and evaluated the claimant at the request of claimant's attorney. Dr. Koprivica reviewed a list of 23 work tasks the claimant had performed that were developed by vocational expert, Michael Dreiling. Mr. Dreiling was retained by the claimant for the purpose of interviewing the claimant and developing the work tasks list. Dr. Koprivica opined claimant could no longer perform 19 of the 23 work tasks resulting in an 83 percent work tasks loss. The Administrative Law Judge disregarded Dr. Koprivica's opinion on work tasks loss finding his opinion not trustworthy. The Administrative Law Judge concluded the doctor over simplified the work tasks in order to maximize claimant's loss of ability to perform such tasks.

The medical evidence was contradictory concerning the diagnosis of claimant's injury, claimant's functional impairment, and permanent physical restrictions. Two physicians testified in this case, Dr. Don B. W. Miskew, an orthopedic surgeon who was claimant's treating physician, and Dr. P. Brent Koprivica, who was retained by the claimant to perform an examination and evaluation. Also admitted into evidence was a report dated November 3, 1994, from Vito J. Carabetta, M.D., who performed an independent medical examination of claimant at the order of the Administrative Law Judge.

Dr. Miskew treated claimant's neck and back injury conservatively from January 17, 1994, through May 25, 1994. The doctor diagnosed claimant with a moderate degree cervical sprain. Dr. Miskew had reviewed an MRI that was performed on January 6, 1994, that showed some spurring at C3 and some narrowing at C3-4 disc level on the left, but no other abnormalities. Claimant did not improve with the conservative treatment and Dr. Miskew referred claimant to Gordon R. Kelly, M.D., a neurologist located in Kansas City, Missouri, for a second opinion. Dr. Kelly examined claimant and reported his findings in a report dated April 22, 1994. Dr. Kelly found claimant's symptoms of neck and back pain, and headaches were most likely related to post traumatic myofascial syndrome. Dr. Miskew, however, did not recognize myofascial pain syndrome as a legitimate medical diagnosis. Dr. Miskew did not believe that claimant suffered from such condition. In fact, Dr. Miskew opined there was no organic basis for claimant's continued complaints of pain and the continued pain complaints were psychological in origin. Claimant was released from Dr. Miskew's care on May 25, 1994, without a permanent functional rating and without permanent physical restrictions. Dr. Miskew also was requested to render an opinion on claimant's loss of his ability to perform work tasks claimant performed in jobs he had worked 15 years preceding the injury. The work tasks analysis had been developed by Gary Weimholt, a vocational expert hired by the respondent. The doctor had not reviewed the work tasks analysis before his deposition and, therefore, did not express an opinion on claimant's loss of ability to perform work tasks. He only reiterated that he had released claimant from his treatment with no physical restrictions.

However, Drs. Koprivica and Carabetta agreed with Dr. Kelly's diagnosis that claimant suffered from post traumatic myofascial or fibromyalgia syndrome. Both doctors also attributed the condition to claimant's December 15, 1993, accident. Furthermore, Drs. Koprivica and Carabetta opined the condition resulted in claimant's suffering permanent functional impairment and permanent physical restrictions. The Appeals Board concludes the medical evidence as a whole established that claimant's work-related injury resulted in claimant suffering permanent functional impairment and permanent physical restrictions. The parties, in fact, stipulated that claimant had suffered a 11 percent permanent functional impairment based on Dr. Carabetta's examination and opinion.

The Appeals Board disagrees with the Administrative Law Judge's finding that Dr. Koprivica's opinion on work tasks loss was untrustworthy and, therefore, not credible. The Appeals Board concludes the work tasks loss component of the work disability test lies somewhere between Dr. Miskew's opinion that claimant had no permanent physical restrictions and Dr. Koprivica's opinion that claimant had permanent physical restrictions that resulted in claimant's loss of 83 percent of his work tasks performing abilities. Accordingly,

the Appeals Board concludes the appropriate loss of claimant's ability to perform work tasks is 41.5 percent. The "new act" requires the work disability tasks loss of 41.5 percent to be averaged with claimant's 100 percent wage loss resulting in a work disability of 71 percent. The Appeals Board finds 71 percent is the appropriate amount to award claimant permanent partial general disability benefits.

(2) The parties stipulated claimant's average weekly wage before he was terminated by the respondent on March 1, 1995, amounted to \$460.28. Thereafter, the parties stipulated claimant's average weekly wage was \$527.72 which included fringe benefit costs. The Administrative Law Judge found the \$460.28 average weekly wage without fringe benefits should be used to calculate the entire award. The Appeals Board finds that K.S.A. 44-511(a)(2) requires the cost of fringe benefits to be included in the average weekly wage if the fringe benefits are discontinued. Therefore, the Award should be calculated on the basis of an average weekly wage of \$527.80 for all weeks following March 1, 1995.

The Appeals Board finds that the Administrative Law Judge has set forth in the Award his findings and conclusions in some detail. The Appeals Board finds those findings and conclusions accurate and appropriate. The Appeals Board adopts those findings and conclusions as its own that are not inconsistent with this Order.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated July 24, 1995, should be, and is hereby modified and an award is entered as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Charlton Walker, and against the respondent, Systems Material Handling Co., Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred December 15, 1993, and based upon an average weekly wage of \$460.28 until March 1, 1995, and thereafter \$527.72.

Claimant is entitled to 41.71 weeks of temporary total disability compensation at the rate of \$306.87 or \$12,799.55, followed by 21.29 weeks of permanent partial disability compensation at the rate of \$306.87 or \$6,533.26, followed by 254.40 weeks of permanent partial disability compensation at the rate of \$313 per week or \$79,627.20 for a 71% permanent partial general disability based on work disability, making a total award of \$98,960.01

As of November 27, 1996, there would be due and owing to claimant 41.71 weeks of temporary total compensation at the rate of \$306.87 per week or \$12,799.55 plus 21.29 weeks of permanent partial disability compensation at the rate of \$306.87 per week or \$6,533.26, plus 91 weeks of permanent partial disability compensation at the rate of \$313 per week or \$28,483.00 for a total due and owing of \$47,815.81 which is ordered paid in one lump

sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$51,144.20 shall be paid at \$313 per week for 163.4 weeks or until further order of the Director.

Unauthorized medical expenses pursuant to K.S.A. 44-510(c) in the amount of \$500 is awarded to the claimant.

Costs of transcripts and the record are taxed against the respondent and its insurance carrier as follows:

Hostetler & Associates, Inc.	\$1,235.70
Metropolitan Court Reporters, Inc.	\$ 412.40
William V. Denton & Associates	\$ 493.30

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John G. O'Connor, Kansas City, KS  
James K. Blickhan, Kansas City, MO  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director